

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FREDRICK BRYANT
Claimant

VS.

SUPERIOR INDUSTRIES INTERNATIONAL
Respondent
Self-Insured

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Docket No. 227,113

ORDER

Claimant appeals from the Award of Administrative Law Judge Steven J. Howard dated October 16, 1998. The Administrative Law Judge awarded claimant a functional impairment of 2.5 percent to the body as a whole, finding claimant had the ability to return to the wheel inspection job. Oral argument was held on May 18, 1999.

APPEARANCES

Claimant appeared by his attorney, Jan L. Fisher of Topeka, Kansas. Respondent, a self-insured, appeared by its attorney, Troy Unruh, appearing for John I. O'Connor of Pittsburg, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations listed in the Award are adopted by the Appeals Board.

ISSUES

Claimant raised the following issue in his appeal:

What is the nature and extent of claimant's disability? Claimant alleges entitlement to a substantial work disability as a result of the injuries suffered while working for respondent.

Respondent raised the following issues in its brief to the Board:

- 1) Did claimant suffer accidental injury arising out of and in the course of his employment on the date or dates alleged?
- 2) Did claimant provide timely notice under K.S.A. 44-520 for an accidental injury occurring on January 24, 1997?
- 3) Is claimant entitled to unauthorized and future medical care for the injuries alleged?
- 4) What is the nature and extent of claimant's injury and/or disability? Respondent alleges claimant is entitled to no award in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant had worked as a janitor for respondent for five and a half years. In April 1993, he suffered a low back injury, resulting in a substantial functional impairment. Claimant returned to work with respondent at a light-duty, accommodated position, and continued working in that job until January 24, 1997, when he alleges, while descending a ladder, he missed the bottom step and jarred his back. Approximately one week later, he noticed increased pain in his leg, but continued working this job through February 16, 1997. As a result of his increased symptoms, he went to Dr. Sullivan and Dr. Ellen Nichols, was provided new restrictions, and returned to work with respondent at a different accommodated job, called wheel watching. Claimant performed the wheel-watching job until approximately April 30, 1997. At that time, he returned to Dr. Nichols and, after conferring with Dr. Nichols and describing his problems, was taken off work.

Claimant was referred to Dr. Laurie Behm, a board certified physical medicine and rehabilitation specialist. Dr. Behm saw claimant on several occasions for the 1993 accident, but examined him only once for the 1997 accident. She assessed claimant an 8 percent permanent impairment to the body as a whole pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. She opined that the 8 percent rating was in addition to the ratings provided to claimant for the 1993 accident.

She placed claimant on restrictions of 10 pounds lifting and stated that he could not tolerate even occasional bending. She suggested claimant apply for Social Security

disability, which he did. She also stated that the mechanism of the injury, that is, stepping down from the ladder and jarring his back, was consistent with the development of a herniated disc. She agreed that claimant's restrictions would place him in a light duty category. This was partially based upon results of an FCE performed in 1993. The FCE was done in 1993 because she found it very difficult to get claimant back to work and opined he was very difficult to treat. Apparently, every time she tried to increase claimant's functional activities, he encountered difficulties.

The 1993 injury involved the L3-L4 lumbar area, while the 1997 injury was at L4-L5. In 1997, claimant did not have a disc herniation, although he did exhibit disc changes. Claimant underwent surgery in 1993, but no surgery was recommended in 1997.

During the examination, Dr. Behm noted the claimant had stocking glove nerve involvement, giveway weakness and peripheral neuropathy. The stocking glove distribution sensation loss did not follow a known nerve pattern. However, claimant had earlier been diagnosed with diabetes, and she opined the diabetes could be affecting claimant's nerve sensation.

Claimant attempted to return to work with respondent to the wheel-watching job. This was a job which required claimant to inspect wheels as they went by on a conveyor belt. Claimant could alternate sitting and standing, and was not required to lift any weights. Claimant worked the job until April 30, 1997, terminating his employment upon the advice of Dr. Nichols. Claimant stated he could not do the job because it was difficult for him to sit too long or stand too long, and the medication he was on made him drowsy. The medication claimant was on was the same medication claimant had been on for several years.

Since his employment with respondent, claimant has not attempted to obtain work with any employer. Claimant described his daily activities as involving very little physical activity. He will occasionally help with the laundry or wash dishes, and generally spends most of his day resting. He does admit to occasionally going fishing with his sons. Claimant has good days and bad days. He has approximately one good day per week which, when it occurs, allows him to involve himself in more physical activity. However, on bad days, claimant can do very little. He stays close to home, cannot ride in a car and has difficulty walking.

On December 9, 1997, claimant was referred by Judge Howard to Dr. Mark Bernhardt, an orthopedic surgeon, for an independent medical examination. Dr. Bernhardt examined claimant, reviewed the MRI report from Mt. Carmel Hospital and claimant's x-rays. He saw no evidence of disc herniation, although claimant did have multiple levels of degeneration. On physical examination, claimant had a negative straight leg raise when seated, but positive when lying down. Dr. Bernhardt noted with this double check method, if the findings do not correlate within 30 degrees, it indicates a non-organic finding.

Dr. Bernhardt found no evidence of atrophy in claimant's legs, which would only be a positive finding with a lumbar disc problem if it were present. Dr. Bernhardt assessed claimant a 15 percent functional impairment to the body as a whole for both the 1993 and 1997 injuries, finding 2.5 percent of that applied to the 1997 injury. Dr. Bernhardt utilized a process called stacking, wherein the original injury is assessed a higher functional impairment, with the later injuries being assessed smaller and smaller percentages of impairment. He felt claimant should be restricted to sedentary work, including no lifting greater than 15 pounds on an occasional basis, meaning up to one-third of the time. He also recommended no repetitive lifting, bending or twisting activities, and opined claimant should be allowed frequent breaks from his work activities and he should refrain from overhead work, crawling, climbing and stooping. When described the wheel-inspecting job, Dr. Bernhardt felt that claimant should be able to do that job.

Claimant was referred to Dr. Kevin Komes, a board certified physical medicine and rehabilitation specialist, on June 22, 1998, for an independent medical examination. By the time claimant was examined by Dr. Komes, he was on Social Security disability. Dr. Komes is a Social Security examiner for the state of Kansas and state of Missouri.

Dr. Komes assessed claimant a 5 percent impairment to the body as a whole based upon the AMA Guides, Fourth Edition, for this injury. He felt claimant fit into Category II of the D.R.E. from the AMA Guides, Fourth Edition. He agreed with Dr. Bernhardt and Dr. Behm that claimant was not a surgical candidate at this time. He was provided Dr. Bernhardt's restrictions, and agreed that they properly applied to claimant. When given a description of the wheel-watching job, he stated that claimant should be able to perform that job as described. He disagreed with the 1997 radiology report describing the L4-L5 in claimant's lumbar spine as a large herniated disc. Dr. Komes felt, at most, it was a bulging disc, which simply oriented to the right at the L4-L5 level.

He was asked whether the treating physician, that is, Dr. Nichols, would be in a better position to give an opinion regarding claimant's ability to perform a job. He answered that Dr. Nichols would have the opportunity to see how claimant reacted to the jobs he was performing, and make recommendations based upon her observations. He was told by claimant that, when claimant attempted to go fishing, he had a significant increase in low back pain and significant difficulty getting into and out of a boat. When told of claimant's difficulty sleeping through the night and the need to lie down and rest during the day, he acknowledged that these factors, if true, would affect claimant's employability.

Claimant was examined by Dr. P. Brent Koprivica at the request of claimant's attorney on May 9, 1994. This examination occurred following claimant's original 1993 injury. At that time, he assessed claimant a 19 percent whole body functional impairment and returned claimant to work light duty. He next examined claimant on July 30, 1997, again at the request of claimant's attorney. The history of injury provided Dr. Koprivica regarding the ladder incident was consistent. He felt claimant suffered an aggravating

injury at L4-L5, with a right side disc herniation. He believed claimant was at maximum medical improvement on the date of his examination. He assessed claimant a 10 percent whole person impairment attributable to the 1997 injury, finding claimant fell within Category III of the D.R.E. He did not believe claimant capable of substantial gainful employment, finding claimant to be essentially and realistically unemployable. He confirmed, on cross-examination, that his opinion regarding claimant's ability to engage in substantial and gainful employment was based, to a significant degree, upon the description of difficulties provided to him by claimant.

Dr. Koprivica was provided a copy of the task analysis performed by vocational expert Dick Santner. Dr. Koprivica, who described claimant as suffering from failed back syndrome, felt claimant incapable of working.

Respondent took the deposition of Larry Goodall, the respondent's human resources manager. At the time of the regular hearing, he was the supervisor of safety and in charge of respondent's workers' compensation program. He was involved in both the 1993 and 1997 workers' compensation claims filed by claimant. He was also involved in returning claimant to light-duty janitorial work after the 1993 injury. He became aware of claimant's alleged January 24, 1997, accident on February 24, 1997. The Appeals Board notes this would satisfy the notice requirements for the accident date of February 16, 1997, but not the January 24, 1997, accident. On the date claimant alleged missing a step off of a ladder, Mr. Goodall was in the room. He recalls claimant removing a ceiling tile, the tile falling apart and water running down over claimant. Mr. Goodall has no recollection of claimant suffering any type of injury or missing a step as he descended the ladder.

He acknowledged that Dr. Nichols and Dr. Jeffrey Greenberg were the authorized doctors and, as a result of Dr. Nichols' restrictions, he placed claimant on the wheel inspection job.

The wheel inspection job was a light-duty position, utilized by respondent on many occasions with injured employees. Mr. Goodall testified that, if claimant had not left his employment with respondent, claimant would be doing the wheel inspection job today.

The parties stipulated into evidence three videotapes, one highlight and two full-length videotapes prepared by Robert Peters of White Buffalo Investigations. On the videotapes, claimant is shown performing various physical activities, including operating riding lawnmowers, riding four-wheel drive vehicles, doing maintenance on various vehicles, at one point backing into and pushing a vehicle a short distance, removing roofing materials from the back of a pick up truck, and assisting another individual in tearing apart the roof over a small porch attached to what appears to be claimant's residence. Claimant's attorney points out that the physical activities contained in the videotapes are done only for short periods of time and these activities are within claimant's abilities, for short periods. Claimant's attorney argues that claimant cannot perform physical labor,

eight hours a day, five days a week, because of his limitations and restrictions as described by the various physicians who have testified in this matter.

Respondent argues, in the alternative, that the videotapes show claimant violating numerous restrictions placed upon him by the doctors. Respondent further argues that the videotapes call into question claimant's credibility and the reliability of the reports of the doctors, which are based, in part, upon claimant's symptoms and complaints.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be upon the claimant to prove the various conditions upon which claimant's right to an award depends by a preponderance of the credible evidence. See 1996 Supp. K.S.A. 44-501 and K.S.A. 1996 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in a case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Here, claimant presents several medical opinions regarding his severely limited physical condition. The various doctors place restrictions on claimant ranging from sedentary to totally incapable of performing any type of labor. Dr. Nichols, the authorized treating physician, removed claimant from the wheel inspection job which, at best, would be an incredibly light job, requiring practically no physical activity other than alternating standing and sitting. To a varying degree, the doctors' opinions are based upon symptoms and complaints voiced by claimant. The physical findings from the various tests performed on claimant do indicate claimant has either a bulging or herniated disc at L4-5. It is documented claimant had surgery in 1993 at L3-4, and returned to accommodated light duty for several years after that. Claimant's limitations, which he describes as off and on depending upon whether he is having a good day or a bad day, appear to be severe.

When questioned at regular hearing on June 18, 1998, claimant was asked specific questions about his physical ability to perform any type of labor. Claimant denied doing anything involving lifting or repair work around his house. He denied attempting to climb ladders or performing simple repair activities. However, one segment of the videotape provided by respondent, which was filmed the day before on June 17, 1998, shows claimant removing a roll of roofing tarp and two 4' x 8' sheets of particle board from the back of a pick up truck. While it cannot be ascertained from this video exactly how much these items weigh, it is fairly certain that they exceed the 10- to 15-pound limitations placed upon claimant by several of the various examining and treating physicians. In the

videotape, claimant does partially climb a ladder, although he does not ascend to the roof, which is also contrary to claimant's regular hearing testimony. Claimant also assists another individual in tearing apart the roof of a small shed attached to claimant's house, utilizing a several-foot long piece of metal pipe to break apart the roof. The physical activities displayed by claimant in this video on June 17, 1998, are directly contradicted by the testimony provided by claimant on June 18, 1998, the next day.

In addition, respondent provides videotape recorded on several other days, beginning June 19, 1997, and continuing through May and June 1998. These videotapes show claimant involved in a multitude of activities, including riding lawnmowers and four-wheel-drive recreational vehicles. Claimant, at times, bends over at the waist, chopping weeds, spraying weeds, working on motor vehicles, and carrying objects of varying sizes and weights, several of which appear to exceed the 10- to 15-pound limitations placed upon claimant by the doctors.

The Administrative Law Judge, after reviewing the videotape and having the opportunity to observe claimant testify in person, opined that claimant had the ability to return to some type of substantial and gainful employment and yet refused to do so. The Administrative Law Judge then limited claimant to his functional impairment, citing Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), and Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998).

With regard to whether claimant suffered accidental injury, the Administrative Law Judge found claimant had failed to prove an accidental injury on January 24, 1997, but had proven the injury through a series of accidents ending February 16, 1997. The Appeals Board agrees. The incident described on January 24, 1997, while claimant was descending a ladder, is directly contradicted by the eye witness testimony of Mr. Goodall. In addition, claimant failed to discuss this incident with anyone before February 24, 1997, which is beyond the 10-day notice requirements of K.S.A. 44-520. The Appeals Board finds no just cause for claimant's failure to provide notice to respondent under K.S.A. 44-520. Therefore, benefits for any alleged injury on that date are denied.

With regard to the February 16, 1997, series of accidents, the Appeals Board concurs with the finding of the Administrative Law Judge that claimant did prove accidental injury, as his descriptions of the incidents are uncontradicted by respondent. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The Appeals Board further finds that the February 24, 1997, notice to Mr. Goodall of this accident is within the ten-day time limit set forth in K.S.A. 44-520.

Claimant alleges entitlement to a substantial work disability, including, if possible, a finding of permanent total disability. Respondent, on the other hand, contends claimant could return to the wheel inspection job worked by claimant through April 30, 1997. Claimant's medical restrictions from the various doctors would either allow or disallow claimant to work this wheel inspection job, depending upon which medical opinion is considered. It is significant that Dr. Nichols, claimant's treating physician, took claimant off the wheel inspection job after having a conference with the claimant. The limitations placed upon claimant are, in part, based upon physical findings, including MRIs, x-rays and physical examinations performed upon claimant by the various health care providers. However, the restrictions placed upon claimant, to a significant degree, are based upon the claimant's description of his symptoms and difficulties in performing any activities.

The Administrative Law Judge noted, and the Appeals Board agrees, that a vital element of claimant's case hinges upon claimant's credibility. In reviewing the medical reports and claimant's testimony, claimant's credibility appears to be good. However, comparing claimant's testimony with the videotapes substantially erodes claimant's credibility. Not only does claimant deny performing many activities contained on the videotapes, he suffers a serious memory loss in his regular hearing testimony one day after performing many of these activities.

The Appeals Board cannot speculate what information may have been provided to the various doctors during the physical examinations, as the medical reports are not all inclusive regarding what claimant may or may not have said. The Appeals Board does, however, find that claimant's testimony regarding his limitations is not credible. The Appeals Board, therefore, finds claimant has the ability to return to the wheel inspection job and is limited to a functional impairment.

The Administrative Law Judge awarded claimant a 2.5 percent functional impairment based upon the testimony of Dr. Bernhardt. Several doctors provided functional impairments for claimant's 1997 accidental injury. Dr. Behm assessed claimant an 8 percent whole body functional impairment, Dr. Koprivica a 10 percent whole body functional impairment, Dr. Komes a 5 percent whole body functional impairment and Dr. Bernhardt a 2.5 percent for the 1997 injuries. In reviewing the various opinions, the Appeals Board finds that claimant has suffered an 8 percent whole body functional impairment as a result of the injuries suffered through February 16, 1997.

The Appeals Board further findings claimant would be entitled to unauthorized medical up to the statutory limit upon presentation of an itemized statement verifying same, and future medical for the February 16, 1997, accidental injury upon application to and approval by the Director of Workers Compensation.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard should be modified, and an Award of compensation is herein granted in favor of claimant, Fredrick Bryant, and against the respondent, Superior Industries International, a qualified self-insured, for a series of injuries through February 16, 1997, and based upon an average weekly wage of \$334.26. Claimant is awarded 32.2 weeks of permanent partial disability compensation at the rate of \$222.85 per week totaling \$7,398.62 for an 8 percent permanent partial general body disability. As of the time of this Award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Claimant is further entitled to authorized medical care pursuant to the Award.

Claimant is further entitled to unauthorized medical care up to the statutory maximum upon presentation of an itemized statement verifying same.

Claimant is further awarded future medical care upon application to and approval by the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Heather A. Lohmeyer, C.S.R. Deposition of Fredrick Bryant	\$219.85
Martin D. Delmont, C.S.R. Transcript of Regular Hearing	\$247.25
Gene Dolginoff Associates Deposition of P. Brent Koprivica, M.D.	\$436.15
Patricia K. Smith Deposition of Laurie L. Behm, M.D. Deposition of Larry Goodall Deposition of Kevin Komes, M.D.	\$481.65
Hostetler & Associates, Inc. Deposition of Dick Santner Deposition of Mark Bernhardt, M.D.	\$423.40

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
John I. O'Connor, Pittsburg, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director